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Supreme Court of the United States

October Term, 195

No. 230

ROY J. UNDERWOOD, *Petitioner*,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers

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HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of Local 542 and its branches 542-A, 542-B, and 542-C of the International Union of Operating Engineers, *Petitioners*

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually, and as representatives of and on behalf of the International Union of Operating Engineers

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
1415 Walnut Street
Philadelphia 2, Pa.
Counsel for Petitioners

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4, PA. 55

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 195

No. _____

ROY J. UNDERWOOD, *Petitioner*,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers.

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of LOCAL 542 and its branches 542-A, 542-B and 542-C of the INTERNATIONAL UNION OF OPERATING ENGINEERS, *Petitioners*,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on Behalf of the INTERNATIONAL UNION OF OPERATING ENGINEERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Roy J. Underwood, and Homer Dawson, Gerard Leone, James Russell, Robert Walsh, Colombo Ac-

chione, Edmond Farmer, Michael Concordia, Norman Gale, Stanley Kosiorek, Gerald Gilroy, Joseph Martin and Clarence Sweeney, in their own behalf and on behalf of all members of Local 542 and its branches 542-A, 542-B and 542-C of the International Union of Operating Engineers, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered on March 26, 1958, dismissing the complaints in the within matters in appeals docketed in the said court as of Nos. 12,267 to 12,270, inclusive, and the order of said court denying rehearing entered on May 13, 1958.

OPINIONS OF THE COURT BELOW

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 152 F. Supp. 648 (Appellants' Appendix, pp. 1120a-1181a). The opinion of the Court of Appeals for the Third Circuit is reported at at ——— F.2d. ———(Appendix B, infra, p. 25). The opinion of the Court of Appeals on petition for rehearing is reported in ——— F.2d ——— (Appendix B, infra, p. 38). Both opinions are reported in 25 Fed. Rules Serv. 17b 32, Case 1.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1958 (Appendix B, infra, pp. 37-38). The order denying rehearing was entered on May 13, 1958 (Appendix B, infra, pp. 43-44). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In determining diversity of citizenship for jurisdictional purposes in suits by an unincorporated local labor union and an individual against an unincorporated international labor union, does diversity of citizenship depend upon the citizenship of the named representatives, through whom the unions are sued, or upon the citizenship of every member of each association?

2. Can a state rule, which prohibits class actions against unincorporated associations, nullify the right under Federal Rule of Civil Procedure 23(a) to bring a class action, and thus destroy federal jurisdiction, where state law is referred to by Federal Rule 17(b) to determine capacity to sue or be sued?

RULES OF PRACTICE INVOLVED

This case involves Rules 17(b) and 23(a) of the Federal Rules of Civil Procedure, 28 U.S.C.; and Rules 2152 and 2153(a) of the Pennsylvania Rules of Civil Procedure, 12 Purdon's Pa. Stat. Ann.—Appendix. They are printed in Appendix A, infra, pp. 23 et seq.

STATEMENT OF THE CASE

Two cases are involved in these proceedings. In the first, petitioner Underwood, president and business manager of Local 542 of the International Union of Operating Engineers, sued the international union through its president, Maloney, to set aside a decision of the international union suspending him from office. The second action is by the remaining petitioners against the international union, through its president, Maloney, and his deputy, Wharton, to set aside a trusteeship imposed over the local union taking exclusive control over the business and property of the local.

The International Union of Operating Engineers is an unincorporated association consisting of 669 local unions, also unincorporated associations, of which the members engage in the operation of heavy equipment in the construction industry, such as cranes, bulldozers, steam-shovels, etc. Each local union is autonomous, with the right to elect its own officers, negotiate all of its own agreements with employers, and institute strikes, without interference from the international.[1]

Local 542 was granted a charter by the international in 1935, with territorial jurisdiction covering the eastern half of Pennsylvania and the entire state of Delaware. Although the charter granted autonomy, the local union was kept under a trusteeship from its inception in 1935 until 1948 when the trusteeship was lifted after the institution of legal proceedings (App. below, 88a-90a, Ex. P-3). The local union functioned thereafter as an autonomous unit only from 1948 to 1952, when the trusteeship was reimposed by the international president, Maloney. On the latter occasion, the local union had been on strike against certain of the employers, who circumvented the local union by making contact directly with Maloney without the knowledge of the local union (App. below, 575a-592a). Maloney thereafter ordered the local union to terminate the strike and return to work within 24 hours after that order, despite his own admission that he could not constitutionally force the local union to approve a contract not acceptable to it (App. below, 34a, 35a, 676a). The local union thereupon filed a petition for an injunction to test the validity of that order and that case was settled by submitting the issues to arbitration. Immediately thereafter Maloney reinvoked the trusteeship without any hearing or the filing of charges. Underwood was suspended because he filed the lawsuit alleging a conspiracy between Maloney and the employers to break the strike.

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[1] International Constitution, Art. 1, Sec. 3 (App. below 1103a); Art. XXIII, Sbd. 11, Secs. (a), (b), (c) and (e) (App. below, 1119a).

The district judge sustained the conviction against Underwood, but held that the trusteeship was invalidly imposed. However, he, nevertheless, permitted the trusteeship to continue to allow Maloney a further opportunity to "properly reinvoke" the trusteeship.

The Court of Appeals did not reach the merits of the controversy, but dismissed both suits, sua sponte, on the ground that diversity of citizenship had not been demonstrated in either of the suits. The court rested its conclusion in this respect upon the ground that the diversity must be determined not by the named representatives, but rather by the citizenship of all of the individual members of the union.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. THE COURT BELOW IMPAIRED FEDERAL JURISDICTION BY MISCONSTRUING F.R.C.P. 17(b) AND THEREBY DEFEATING THE PURPOSE OF F.R.C.P. 23(a), AND SUBJECTING IT TO STATE PRACTICE, THUS CONFLICTING WITH THE DECISION OF THIS COURT IN *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, AND OF THE COURTS OF APPEALS FOR THE FOURTH CIRCUIT *(Tunstall v. Brotherhood*, 148 F.2d 403) AND EIGHTH CIRCUIT *(Montgomery Ward v. Langer*, 168 F. 2d 182).

The basis of the decision of the Court of Appeals was that in a diversity case, Rule 17(b), Fed. R. Civ. Proc. 28 U.S.C.,[2] provides that capacity of an unincorporated association to be sued depends upon the law of the state where the court is sitting; that, thus, Pennsylvania law provides the capacity to be sued, and, by Pennsylvania Rule of Civil Procedure 2153,[3] such association *must* be sued as an entity,

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[2] Infra, Appendix A, p. 23.

[3] 12 Purdon's Pa. Stat. Ann., Appendix; infra, Appendix A, p. 24.

and that class action is prohibited;[4] that, therefore, although the named representatives were of diverse citizenship, since *all* members of the union were not shown to be diverse from the plaintiffs, there was held to be no federal jurisdiction. Thus, the Court of Appeals held that while the association is deemed an entity as to *capacity*, yet for the purpose of *jurisdiction*, it loses this characteristic and becomes a non-entity, a group of individuals, without the basic citizenship of an entity, but stripped of the historic liability of the group to a class action in aid of federal jurisdiction.

This non-sequitur has resulted from the misconstruction of the meaning and effect of F.R.C.P. 17(b), denial of equality between it and F.R.C.P. 23(a), and attributing to the state rule an improper supremacy over the federal practice. Such conclusion is in direct conflict with the decisions of this court, the intention behind the rules as expressed by the Advisory Committee on Federal Rules, and the unanimous opinions of the accepted text authorities.

Federal Rule 17(b) was intended to *add* to the existing procedures in federal practice and not to deprive litigants of procedures which they already had, nor to subject existing federal jurisdiction to the state rules of practice. F.R.C.P. 82. This rule and Rule 23(a) are in pari materia, and provide alternative methods of bringing unincorporated associations into the federal court. The Supreme Court Advisory Committee on Federal Rules refers[5] as authority for the intention of the rule and the need which it sought to remedy, to the article, "A New Federal Civil Procedure," by Dean (now Judge) Clark and Professor

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[4] Although class action is prohibited as to association plaintiff (Pa. R. C. P. 2152), as to an association defendant, the rule is only *permissive* (Pa. R. C. P. 2153(a)), providing that, "it shall be sufficient" to name either the association by its name, or any officer as trustee ad litem.

[5] F. R. C. P. 17, Note to Subd. (b).

Moore [6] which points out that Rule 17(b) was intended to remedy those situations were federal jurisdiction was avoided because an unincorporated association could not be treated as an entity, with a citizenship, and jurisdiction depended upon diversity as to *all* members of the association. The provision was intended to give litigants the benefit of state-created capacity where it overcame the obstacle to federal jurisdiction, so as to "modify the present federal rules which refuses to endow such a unit with citizenship, but requires the citizenship of its members to be looked to." These authorities point out that, "The class suit offered an avenue of escape at times, for in such a suit only the citizenship of the representatives is looked to," and giving effect to a state entity rule would be an additional aid to the federal diversity jurisdiction. To further clarify the specific intent of the rule, they discuss the benefits to be had in treating unincorporated associations as if they were incorporated, for citizenship purposes, in order to solve the problem of obtaining diversity jurisdiction against a national association.[7] Thus, it is without doubt that the authors of the rule were intent upon broadening the opportunities to obtain federal jurisdiction theretofore limited because of state viewpoint and obstacles of capacity.

The fact that the state law is referred to in aid of the federal rule to ascertain *capacity* cannot be used in derogation of another federal rule (F.R.C.P. 23(a)). To the extent that the state rule may determine *capacity*, it has effect. An unincorporated association can, under Pennsylvania law, be sued, and, further, it can be entitled by its common name. This is not in conflict with the federal practice. However, the state practice may not be extended further to intrude into a field specifically covered by a federal rule (F.R.C.P. 23(a)) and act in derogation thereof.

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[6] 44 *Yale L. J.* 1291, 1312-17.

[7] 44 *Yale L. J.* 1291, 1316-7. See *American Fed. of Mus. v. Stein*, 213 F. 2d 679 (6 Cir.).

In these views, the authoritative writers are unanimous.

Professor Moore, discussing the effect of Rule 17(b) upon unincorporated associations, states that in diversity cases, where the state rule gives the association capacity to sue or be sued in its common name, as in Pennsylvania, the citizenship of the individual members must be wholly diverse from the opposing parties, so that in most cases federal jurisdiction is impossible. He continues:

> "The escape in such case has been, and must continue to be, the class action where only the citizenship of the representatives need appear."[8]
>
> Accord: Clark, *Code Heading* (1947), p. 406.

The applicability of class action was intended by the authors of the rules to be considered *wholly apart* from the question of capacity; so that, under any interpretation, a state rule as to class action is immaterial to the federal procedure which has its *own* thought in the matter and may not be frustrated in its intent.

Moore and Cohn assert that although Rule 17 provides that an association may, in certain instances, be sued as an entity, the *class action "remains vitally significant in the federal courts"* to make diversity jurisdiction available by suing the association through a named representative whose citizenship alone is significant. "Federal Class Actions," 32 *Ill. L. R.* 307, 315 (1937); similarly, 3 Moore's *Federal Practice*, pp. 3435-6. This article is cited in the

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[8] Citing *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (4 Cir., 1945). 3 Moore's *Federal Practice*, pp. 1412-13, quoting his article, "Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft," (1937) 25 *Geo. L. J.* 551, 566, referred to by the Rules Committee as authoritative. Note to F. R. C. P. 23(a)(1).

notes of the Rules Advisory Committee for its general analysis of class actions.[9]

In a later article, also cited as authority by the Advisory Committee,[10] the same authors state that in a diversity case, unless the citizenship of only the named parties to the record is material, "the possibilities of federal jurisdiction based upon diversity . . . would vary inversely with the size of the class." They conclude:

> "To summarize: A new second subdivision to Rule 23 based upon case law could read as follows:
>
> "(e) Requisites of Jurisdiction. Where jurisdiction is founded upon diversity of citizenship, the citizenship of only the original parties shall be looked to in the absence of collusion." Federal Class Actions, (1938) 32 Ill. L. R. 555, 565-6.

Barron and Holtzoff are in complete accord with Judge Clark and Professor Moore that the solution to the difficulty of the unincorporated association, especially those having members in many states, is the use of a class suit under Rule 23, in which only the citizenship of the *representatives* of the class is looked to. They continued:

> "It has been stated that Rules 17(b) and 23 provide alternative methods for bringing such associations into court." 2 Barron and Holtzoff, *Federal Practice and Procedure*, pp. 36-37, 180.

The survival of the class action over questions of capacity of parties and its supervening independence in the

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[9] F. R. C. P. 23, Note to Subd. (a). Dean Clark (now Judge, 2 Cir.), the reporter to the Supreme Court Advisory Committee, has cited this article and that by the same authors, hereinafter cited, as "very interesting and instructive on this important subject." (Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 22, 1938, p. 264); and as authoritative (Proceedings of the Institute on Federal Rules, Wash., D. C., Oct. 6, 1938, p. 66).

[10] F. R. C. P. 23, Note to Subd. (a).

federal practice was not new with the 1938 rules of procedure. In *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356, 65 L. Ed. 673, this court held that former Equity Rule 38, which provided for class actions through a named representative, was not delimited by Equity Rule 39, which insulated from a decree persons, otherwise proper parties, who were without capacity, out of the jurisdiction or whose citizenship would oust jurisdiction. This court said that the class action rule was specifically intended to cover cases where those interested were too numerous to be made parties, and reside in many different states: that the suit in question "was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit." Non-diverse persons were in the class, and their rights were duly represented, so that they would be bound by the decree. Rule 38 was intended to apply to just such cases and Rule 39 does not apply to a subject specifically covered elsewhere. In the present rules, Rule 23(a) is a substantial restatement of Equity Rule 38,[11] and the authors have said it should be similarly applied.

The Courts of Appeals for the Fourth and Eighth Circuits have applied Rules 17(b) and 23(a) in conformity with the decision of this court and the intent of the authors of the rules.

In *Tunstall v. Brotherhood of Locomotive F. and E.*, 148 F. 2d 403 (4 Cir., 1945), the late, eminent Chief Judge Parker discussed the class suit against unincorporated unions. He pointed out that "*even* in a state . . . which adheres to the common law rule that an unincorporated labor association may not be sued as an entity," (405) it may be sued through representatives as a class. It follows, then, that where the union may be sued as an entity, it may clearly be sued in a class action. The opinion continues, at page 405:

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[11] *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182, 186 (8 Cir.).

"The federal rules have in no wise limited or restricted the right to bring class suits in proper cases. Rule 23 provides for them; and, in a note to the rule, the Rules Committee states that it is a substantial restatement of the former equity rule as that rule has been construed by the courts. . . .

* * * * *

"And there is nothing in Rule 17(b) which limits the right to bring a class suit under Rule 23(a) in proper cases . . .; and the right to bring such class suit continues to be of great value when the right to sue the association in its common name is, *for any reason*, unavailable. Instances where it is not available are cases *where jurisdiction based on diversity would be defeated* by a suit by or against the association *but not* by a suit by or against representatives. . . . *The manifest purpose of the provision of Rule 17(b) relating to suits against partnerships and unincorporated associations is to add to, not to detract from, the existing facilities for obtaining jurisdiction over them.* The language of Rule 17(b) relating to suits against partnerships and unincorporated associations is *permissive.* So, also, is the language of 23(a). *Together they provide alternative methods of bringing unincorporated associations into court.*" (Italics supplied.)

The Third Circuit would limit the Tunstall case to situations where jurisdiction is based upon a federal question, but not where based upon diversity of citizenship. However, Judge Parker deemed it necessary to discuss class suits as apply in the instant case and made it clear that these alternative methods exist in diversity cases. Further, the treatises recognize the Tunstall case as authority for use of these alternatives where federal jurisdiction is founded upon either basis. 3 Moore's *Federal Practice*, page 1413, note 23; 2 Barron & Holtzoff *Federal Practice*

and Procedure, pages 36-7, note 28; 3 Goodrich-Amram *Pa. Proc. Rules Svc.* (1957 Supp.), Sec. 2153(a)2, p. 23.

The Court of Appeals for the Eighth Circuit specifically stated its agreement with the Fourth Circuit on this principle in *Montgomery Ward v. Langer*, 168 F. 2d 182, 187 (8 Cir., 1948). There, the applicability of Rule 23(a) to all suits which may benefit from its "great value," as described by Judge Parker in the Tunstall case (405) was discussed. This was a diversity class action against two unincorporated unions. Judge Sanborn emphasized the broad application of Rule 23 and expressed an eloquent plea for its liberal use, "so that mere numbers would not disable large groups from enforcing their rights or grant them immunity from their wrongs (pp. 186-7)." [12] After discussing the alternatives provided by Rules 17(b) and 23(a), Judge Sanborn concluded:

> "We know of no practical reason why the procedure prescribed by Rule 23(a)(1) should not be as fair and as effective in enabling unincorporated associations to sue or be sued as is the procedure—which prevails in many jurisdictions—of permitting them to sue or defend under their common names. Where such associations have the status of legal entities, the members who act for them in bringing or defending actions are in reality the representatives of the membership as a whole."

It is clear, then, that Rule 17(b) is not exclusive, and that Rule 23(a) stands beside it as a method which may be

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[12] This request, it should be noted, is a plea for the liberal grant of entry to the federal courts as intended by the Supreme Court. To refer the dismissed plaintiff to the state court for solace is not the answer. We must assume that Judge Sanborn is well aware that the latter tribunals may grant relief in most cases. He speaks against the background of Judge Parker's language in Tunstall (p. 405) which points out that where "jurisdiction based on diversity would be defeated" but for a class suit, Rule 23 is the remedy to *save the federal jurisdiction.*

chosen to sue an unincorporated association, not limited by it in any way. Rule 23 may be used where the right to sue an association in its common name is unavailable, whether the unavailability be because there is no federal question and no state provision therefor (see *Montgomery Ward & Co. v. Langer*, supra), or because diversity would be defeated by suit against the common name (*International Allied Printing Trades Assn. v. Master Printers Union*, 34 F. Supp. 178 (D. N.J.); *Malarney v. Upholsterers' Int'l Union*, 7 F. R. D. 403 (E.D. Pa.)). Nor does the fact that there may be a *federal* rule or statute permitting suit against an association as an entity prohibit the class action against such association. *Tisa v. Potofsky*, 90 F. Supp. 175 (S.D. N.Y.).

The court below states, in its opinion, sur petition for rehearing, that "there is no question but that in those cases where jurisdiction based on diversity would be defeated by a suit by or against the unincorporated assocation as an entity that obstacle may be hurdled by the use of the class action, by a suit brought by or against representative members whose respective citizenships are diverse from those of the opposing parties . . . (but) In states where an unincorporated association can neither sue nor be sued as a class, it necessarily follows that the individual members of an association lack the capacity to sue or be sued as class representatives of the unincorporated association."

However, it is submitted that the fact that a union may be sued (or must be sued) as an entity under *Pennsylvania* law does not prevent the *federal* practice from applying in the *federal* court. Federal Rule 23 still serves its useful function and must be applied in accordance with the intent behind it. Just as the effect of this rule cannot be deemed to have been abolished in absence of "the clearly expressed mandate of Congress,"[13] so, fully, is the state rule wholly impotent to act upon it in derogation of the

[13] *Tisa v. Potofsky*, 90 F. Supp. 175 (S.D. N. Y.). See *Advertising Spec. Nat. Assn. v. F. T. C.*, 238 F. 2d 108, 119 (1 Cir).

federal practice, and to deprive the federal court of jurisdiction. Although it may be stated that a *state* procedural rule can forbid a class action against an unincorporated association, such rule cannot prevent the operation of the *federal* rule from giving effect to *its* class action provision. All that the Pennsylvania rule has done is provide a method whereby "it shall be sufficient" to sue such defendant by using its common name. As has been stated by the courts and authorities, the class action method provided by federal law is still applicable. The federal law seeks of the state only *capacity* to be sued. It is established that the union has such capacity and, further, by Pa. R. C. P. 2153(a), it is sufficient to use the union's common name. At this point, the state's effect ends. Thereafter, the federal rule is solely applicable.

Just as under F. R. C. P. 17(b), where the cause of action is federal in nature and a defendant association may be sued in its common name, it may be so named in a *class action*,[14] so may an association, which under state law can be sued in its common name, be made a defendant by virtue of the class action rule. Otherwise, the state rule would be given greater effect in the federal courts than the federal rule itself. Obviously, such a result cannot be permitted.

Although state law may, under F. R. C. P. 17(b) define *capacity* of a party, its application and intervention must be strictly construed, and limited to the specific position accorded it by the federal rule:

> ". . . State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a

[14] *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975; *Advertising Special Nat. Assn. v. F. T. C.*, 238 F. 2d 109, 119 (1 Cir., 1956).

State court cannot give it." *Guaranty Trust Co. v. York*, 326 U. S. 99, 106, 89 L. Ed. 2079, 2084-5.

On the other hand, the Federal Rules are to be liberally construed "to secure the just, speedy and inexpensive determination of every action." F. R. C. P. No. 1. 2 Moore's *Federal Practice*, Sec. 1.13, pp. 55-7.

The opinion of the court below presupposes that the question of class suit is encompassed in the term "capacity." But, reference to the contents of the Federal Rules makes it clear that their proponents did not think so. Otherwise, Rule 23 would have been part of Rule 17, instead of a separate and special provision. Where a general provision in a rule or statute is in conflict with a particular provision in the same or another rule or statute, the two must be construed to give effect to both. If they are irreconcilable, the *particular* provision must prevail. Crawford, *The Construction of Statutes* (1940), Section 167. Upon this basis alone, Rule 23, being a specific mechanism provided to solve a definite problem, must prevail. *Supreme Tribe of Ben Hur v. Cauble*, supra. This is not only because it is specifically upon the subject of class actions, but because, in addition, such application will better satisfy the spirit of the Federal Rules.

It must be noted here that the language of Pa. R. C. P. 2153(a), concerning actions *against* associations is expressly merely *permissive* in its language. Further, this rule provides a change in procedure to permit suit against an association in its common name for two practical reasons, intended to benefit plaintiffs and solve a definite problem which had specifically hindered persons in bringing claims against unincorporated associations. 3 Goodrich-Amram *Pa. Proc. Rules Svc.*, Sec. 2153(a)(2), pp. 9-10. To use this rule to curtail methods of suit previously open to a plaintiff in the federal court would run directly in the face of the intent of the rule.

The commentary in Goodrich-Amram (Vol. 3, Sec. 2152-2) states that prohibition of class suits is implicit in Rule 2152. This is clearly because the rule states that in

actions *by* associations they "*shall* be prosecuted," etc. But Pa. Rule 2153, concerning actions *against* associations, states that "it shall be sufficient," etc. We must assume that the words used were chosen advisedly. The fact that two consecutive paragraphs upon the same subject and aspect thereof are differently worded indicates clearly that different meanings were intended. The latter rule is obviously *permissive* in nature. It is clear, then, that class actions against associations are not prohibited in Pennsylvania, as was assumed by the Court of Appeals.

However, even were it to be assumed that Pennsylvania *does* bar class actions, even against unincorporated associations, and that such state rule can, under some rationale, deprive Federal Rule 23(a) of its vitality, even then diversity of jurisdiction would exist, since it would have to be measured by the citizenship of the named representative or, as the Pennsylvania rule describes him, the trustee ad litem, for this court has repeatedly held that "representatives may stand upon their own citizenship in the federal courts irrespectively of the persons whom they represent." *City of New Orleans v. Gaines's Administrator*, 138 U. S. 595, 606-7, 34 L. Ed. 1102, 1106. Similarly, in *Mexican Central Ry. Co. v. Eckman*, 187 U. S. 429, 433-4, 47 L. Ed. 245, 247, this court said that so long as the named party is not a "figurehead," diversity jurisdiction "depends not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record." To the same effect is *Fallat v. Gouran*, 220 F. 2d 325, (3 Cir.) where the court held, in a diversity suit by a guardian for an incompetent, diversity depends upon the citizenship of the guardian, and not of the incompetent.

In discussing Pa. R. C. P. 2152-3, which provides that it shall be sufficient, in an action against an unincorporated association that it be sued in its common name or in the name of a member as a trustee ad litem, the leading author-

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[15] As where the state government appeared in a suit on a sheriff's bond.

ities on the subject have compared the status of such representative or trustees to that of a "next friend" or guardian as above, placed on the record to represent a minor, or other incompetent. 3 Goodrich-Amram *Pa. Proc. Rules Svc.*, Sec. 2152 (note), 2152-1 (commentary).

Therefore, even accepting for the sake of argument, the conclusions of the Court of Appeals as to the meaning of the Pennsylvania law and its supremacy over the federal class action procedure, we are brought back to the fact that, whether the association be a group or an individual, with or without capacity, it is the citizenship of the representative that is the test of diversity. If, as the Pennsylvania rules are presented by the court below, the association is an entity, it must then have its own personality and citizenship.[16] True, as in the case of a minor, it may not have capacity to sue or be sued, but that does not detract from the attribute of entity and susceptibility to suit. Under the Pennsylvania rule, the unincorporated association is given even a greater dignity than an incompetent or a minor, since it can be sued in its own common name, without naming a representative or trustee. If, under the option given by the rule, it is sued through a trustee, then, following the Pennsylvania as well as the federal practice, the citizenship of the representative would measure the diversity.

It is submitted that the court below in misapplying F. R. C. P. 17(b) and misconstruing Pa. R. C. P. 2156, denied to F. R. C. P. 23(a) the effect intended for it, and is in conflict with the class action doctrine announced by this

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[16] If Pennsylvania is deemed to consider the association as a pure entity, then, the courts should follow the growing tendency to treat such associations as entities for all purposes, including the property of citizenship where the principal office is maintained. *Van Sant v. American Express Co.*, 169 F. 2d 355 (3 Cir.); *Sperry v. Association of American Railroads*, 132 F. 2d 409 (2 Cir.); Barron & Holtzoff, *Federal Practice & Procedure*, Vol. 2, page 36; Goodrich-Amram, *Pa. Proc. Rules Svc.*, Vol. 3, Secs. 2153(a)-2, 2156-(a)-1.

court and the authors of the Federal Rules of Civil Procedure, and with the specific decisions of the Fourth and Eighth Circuits. The decision below should be reviewed and reversed.

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE HOLDING OF THIS COURT THAT IN A CLASS ACTION DIVERSITY OF CITIZENSHIP DEPENDS UPON THE CITIZENSHIP OF THE NAMED PARTIES, ONLY, AND NOT OF EACH MEMRER OF THE CLASS, *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 65 L. Ed. 673.

The decision below, in denying to litigants the class action device and in testing diversity by the citizenship of all members of the union, denies the benefit of basic federal doctrine. This court has defined the circumstances under which a class action may be brought and held that in such cases the citizenship of only the named parties should be looked to in measuring diversity of citizenship.

Federal Rule of Civil Procedure 82 provides that, "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein." Accordingly, the jurisdiction of the federal courts which existed prior to the adoption of the Federal Rules of Civil Procedure remains unimpaired.

Under the common law, unincorporated associations were deemed to be groups of individuals with none of the characteristics of unity or entity. They were not permitted to sue or be sued as entities, as in the case of corporations. Recognizing the practical limitations upon bringing all of the members of such associations before a court, equity devised the procedure which has become known as the class action, permitting an unincorporated association to sue or be sued through named representatives. In such situations, the practical problems which gave original rise to this device, also emphasized the difficulty of obtaining federal jurisdiction by reason of diversity of citizenship, where a class was a party to an action. Thus, the test of diversity of

citizenship in a class action was held to be the citizenship of the named representatives, irrespective of that of the remaining members of the class.

This situation arose in *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 65 L. Ed. 673. That case announced the applicable principle of law, which has remained unimpaired. There, in a prior action, a number of members of an unincorporated association had started suit against it and its officers in the Indiana district court to enjoin the use of certain funds. None of the named plaintiffs resided in Indiana, which was the state of the association and its officers. The action was prosecuted for all members of the organization, which included citizens of Indiana, and a final decree was entered, which was never vacated.

Following that decree, a number of members who were residents of Indiana commenced an action against the association to relitigate the same questions previously determined. Thereupon, this action was filed on behalf of the association to enjoin the latter suit, on the ground that the original decree was res judicata as to all members of the society, irrespective of whether they were named parties, or whether there was diversity of citizenship as to each of them. The trial court dismissed the complaint on the ground that the members residing in Indiana could not be bound by representation in the class suit previously mentioned, since the presence of Indiana members would have ousted federal jurisdiction based on diversity.

This court disagreed with that conclusion, and reversed, holding that the original decree was binding upon citizens of Indiana who were in the class, even though not otherwise parties to the bill; that diversity as to all of the members of the association was unnecessary to the jurisdiction of the court.

This court reviewed the basis for class suits, pointing out that they have long been recognized in federal practice where those interested are so numerous as to make it inconvenient or impossible to join all as parties. To pre-

vent a failure of justice in such situations, equity permits a number of the interested persons to represent the entire body, and the decree binds all as if they were actually before the court. In view of the numbers of persons involved in such cases, coming from many states of the union, the same practical consideration required that diversity of citizenship be tested only by those actually made parties. Thus, Equity Rule 38, which provided for class actions, was specifically amended to delete a provision which insulated absent parties from the effect of the class decree (255 U. S. at 363-4, 365, 65 L. Ed. at 678, 679).

To the contention that joinder of members as to whom there was no diversity would have defeated the jurisdiction, this court said that once jurisdiction is lawfully acquired as between the originally named parties, it could not be defeated by intervention or any other device (255 U. S. at 365-6, 65 L. Ed. at 679). Further, this court noted that, "If the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the right of most of the class by a decree rendered upon a theory which may be repudiated in another forum, as to a part of the same class." (255 U. S. at 366-7, 65 L. Ed. at 679).

Thus, inherent in the federal diversity jurisdiction is the power to entertain an action brought against an unincorporated association through certain named representatives whose citizenship alone is the measure of diversity, without reference to the other members of the class.

In the instant case, the citizenship of the International Union of Operating Engineers must, therefore, be determined by the citizenship of Maloney and Wharton, through whom, as representatives, such International Union is sued. In the first case, since Underwood is a citizen of Pennsylvania and Maloney a citizen of Illinois, the court was clearly vested with jurisdiction based upon diversity of citizenship. The same applies with respect to the suit by petitioners, Dawson, et al., as representatives of the Local

Union, against Maloney and Wharton, as representatives of the International Union.

The decision of the court below is in direct conflict with the principle expressed by this court in the Ben Hur case, and, since the rules adopted in 1938 were expressly not intended to impair the prior jurisdiction upon this ground alone, it should be reviewed and set aside.

CONCLUSION

The court below loses sight of the very reason for the federal class suit device which, even long before the new federal rules, was used to solve the problem of federal diversity jurisdiction in unincorporated associations. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356, 363-6, 65 L. Ed. 673, 678-9;[17] Barron & Holtzoff, Vol. 2, page 176.

It is respectfully submitted that the decision of the court below conflicts with the decisions of this court and of at least the Fourth and Eighth Circuits, and with the expressed intentions of the Advisory Committee on Federal Rules, in that it:

(1) interprets "capacity" as included in F. R. C. P. 17(b) contra to the meaning and extent intended by its own authors and its fellow Rules; and

(2) applies F. R. C. P. 17(b) so as to cause it to borrow more than *capacity* from the state practice; and

(3) relegates F. R. C. P. 23(a) to the position of a second-class Rule, without effect even where specifically applicable, and subject to a conflicting state rule; and thereby

(4) permits the state practice to nullify in the federal court the federal practice in a field where the latter has specific application; and

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[17] Cited by Federal Rules Advisory Committee, F. R. C. P. 23, note to subd. (a), clause (1).

(5) subjects federal practice to state practice by erroneous consideration and application of state rules.

This decision will have the broad effect of depriving to unincorporated associations of national membership entry into the federal courts. Such a widespread deprivation of federal jurisdiction for or against so great a class is in direct conflict with the purpose and spirit of the rules. *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182, 187 (8 Cir.). It wipes out as to this segment of litigants a method of procedure long recognized by the courts, and thereby infringes upon historic federal jurisdiction.

The conflict that exists inhibits the intended application of the Federal Rules of Civil Procedure, and prevents any uniformity in a situation that affects every unincorporated association in the land. It is respectfully submitted that a writ of certiorari should be granted to review and settle this issue.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
Counsel for Petitioners.

Appendix A

FEDERAL RULES OF CIVIL PROCEDURE, 28 U. S. C.

RULE 17

PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., Secs. 754 and 959(a). As amended Dec. 27, 1946; Dec. 29, 1948, eff. October 20, 1949.

RULE 23

CLASS ACTIONS

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right

and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

PENNSYLVANIA RULES OF CIVIL PROCEDURE
12 Purdon's Pa. Stat. Ann.

RULE 2152

ACTIONS BY ASSOCIATIONS

An action prosecuted by an association shall be prosecuted in the name of a member or members thereof as trustees ad litem for such association. An action so prosecuted shall be entitled "X Association by A and B, Trustees ad Litem" against the party defendant. Adopted May 1, 1939. Eff. Nov. 6, 1939.

RULE 2153

ACTIONS AGAINST ASSOCIATIONS

(a) In an action prosecuted against an association it shall be sufficient to name as defendant either the association by its name, whether the same is registered, filed or not, or any officer of the association as trustee ad litem for such association in the manner prescribed by Rule 2152.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,267 and 12,269

ROY J. UNDERWOOD, *Appellant*,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers.

Nos. 12,268 and 12,270

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of LOCAL 542 and its branches 542-A, 542-B and 542-C of the INTERNATIONAL UNION OF OPERATING ENGINEERS, *Appellants*,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on behalf of the INTERNATIONAL UNION OF OPERATING ENGINEERS.

No. 12,289

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all mem-

bers of LOCAL 542 and its branches 542-A, 542-B and 542-C of the INTERNATIONAL UNION OF OPERATING ENGINEERS,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on behalf of the INTERNATIONAL UNION OF OPERATING ENGINEERS.

Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 18, 1957

Before BIGGS, *Chief Judge*, and GOODRICH AND HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed March 26, 1958)

By BIGGS, *Chief Judge*

The five appeals at bar were taken from judgments entered in two suits which were tried together by the court below and which arose from the same or connected operative facts.[1] The first suit, at C.A. No. 14,398 in the court below

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[1] The first appeal, at our No. 12,267, taken by Underwood from the judgment of the court below at its C.A. No. 14,398. The second appeal, at our No. 12,268, was taken by Dawson and others from that part of the decree of the court below at its C.A. No. 14,547 which permitted Maloney to continue supervision of the Local, in effect reinvoking supervision of the Local by the International despite that portion of the decree which vacated the order of supervision. The appeals at our No. 12,269 and No. 12,270 are from the District Court's order at C.A. No. 14,547 dissolving a preliminary injunction restraining the holding of elections by Local 542 and were taken by Underwood and Dawson. On June 12, 1957, this court entered a restraining order maintaining the status quo during

was brought by Underwood, a resident of Pennsylvania, President and Business Agent of Local 542 and of its affiliated branches in Pennsylvania, Delaware and New Jersey, against William E. Maloney, a resident of Illinois, President of the International Union of Operating Engineers with which Local 542 was affiliated. Underwood seeks injunctive relief to prevent Maloney individually and as representative of the International Union from enforcing an order of the General Executive Board of the International which removed him, Underwood, from his position as President and Business Agent of Local 542, from membership in the Local, and from all activities for a definite period subject to a proviso which need not be stated here, and which also fined him $3,500. Underwood also seeks damages.

The other suit, at C.A. No. 14,547 in the court below, was brought by Dawson and others, residents of Delaware or Pennsylvania, all members of Local 542, as a so-called "class" action on behalf of all of the members of Local 542, against Maloney and Wharton, a resident of Washington, D.C., trustee of Local 542, appointed such by Maloney, pursuant to provisions of the constitution and by-laws of the International, purportedly to the end that a strike of long duration should be terminated. Dawson and his associates seek a decree terminating the supervision of Local 542 by the International through its trustee, Wharton. They seek also the termination of an alleged conspiracy by Maloney,

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the pendency of the appeals. The appeal at our No. 12,289 was taken by Maloney from that part of the decree of the court below in C.A. No. 14,547 which set aside the order of supervision, previously referred to.

A third suit in the court below, at its No. C.A. 14,071, in which an appeal was not taken, supplied certain facts which need not be gone into in detail here. It is sufficient to state here that Underwood brought this suit on his own behalf and on behalf of Local 542 to test the validity of a cease-strike order entered by Maloney as president of the International. It was disposed of by settlement.

as President of the International, and others to interfere in the affairs of the Local, and a declaration that the actions and orders of Maloney, as President of the International, allegedly interfering with Local 542 in effecting collective bargaining agreements with employers were illegal. Dawson and his associates pray as well for a declaration voiding the suspension and the "conviction" of Underwood, President and Business Agent of the Local, referred to in the preceding paragraph of this opinion and they also seek to enjoin reprisals against Underwood because he brought the suit in the court below at its C.A. No. 14,071 referred to in note 1, *supra*. Dawson and his associates also pray for an accounting and other relief germane to that already referred to in this paragraph.

Jurisdiction of the suits in the court below is alleged to be based upon diversity of citizenship and jurisdictional amount. We are of the opinion that the suit at C.A. No. 14,547 should have been dismissed by the court below for want of diversity and that the major cause of action alleged at C.A. No. 14,398 in the court below does not lie within the diversity jurisdiction.

It will be observed that the suits at C.A. No. 14,547 and 14,398 with which we are concerned were brought against Maloney or Maloney and Wharton not only in their respective individual capacities but also as class representatives of the International Union. Putting to one side for the time being those aspects of the suits relating to Maloney and Wharton as individuals, it is clear that jurisdiction as to the International is sought to be maintained on the theory of a class suit in which only the citizenships of the representatives of Local 542 and of the International, the two respective "classes," need be considered for the purposes of maintaining diversity jurisdiction. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

Rule 17(b), Fed. Rules Civ. Proc., 28 U.S.C.,[2] provides that in cases by or against unincorporated associations, such as the International and the Local, where jurisdiction is bottomed on diversity, as contrasted with jurisdiction based on a federal question, the courts must determine the capacity of an unincorporated association to sue or be sued by reference to the law of the state in which the federal court is sitting. Worthington Pump & Machinery Corp. v. Local 259, 63 F. Supp. 411 (D.C. Mass. 1945); Sanders v. International etc., 120 F. Supp. 390 (D.C. Ky. 1954); American Newspaper Guild v. Mackinnon, 108 F. Supp. 312 (D.C. Utah 1952). Since 1939 the law of Pennsylvania has forbidden a suit by or against an unincorporated association to be maintained as a class action, and such suits must be deemed to be brought either on behalf of or against the unincorporated association itself.[3] Notes of Procedural

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[2] Rule 17(b), Fed. Rules Civ. Proc., 28 U. S. C., provides:

"Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held*, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§754 and 959(a). As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.". (Emphasis supplied.)

[3] "Rule 2152. Actions by associations.

"An action prosecuted by an association *shall* be prosecuted in the name of a member or members thereof as trustees ad litem for such association. An action so prosecuted shall be entitled 'X Association by A and B, Trustees ad Litem' against the party defendant." (Emphasis supplied.)

"Rule 2153. Actions against associations.

"(a) In an action prosecuted against an association it shall

Rules Committee to Rule 2330(a); 3 Goodrich-Amram, Standard Pennsylvania Practice 2152-2; 4 Anderson Pennsylvania Practice 195; Stern, Intra-Union Activities, Membership and Collective Bargaining Rights Under Pennsylvania Law, 29 Temple L.Q. 38 (1955); Laudenslager v. Wiegner, 22 Lehigh Co., 137 (Pa. 1946); Winters v. New Johnny Jones Expdsition, 6 Beaver 138 (Pa. 1944). Cf. Pennsylvania Co. v. Houseman, 341 Pa. 311, 316, 19 A. 2d 148, 150 (1946). It follows, therefore, that under Rule 17(b) an unincorporated association must sue or be sued as an entity in the United States District Court for the Eastern District of Pennsylvania.

Jurisdiction nonetheless must be established and for jurisdictional purposes the citizenship of an unincorporated association is determined by the citizenship of its members. Therefore, where jurisdiction is sought to be founded on diversity of citizenship, the action being by or against an unincorporated association, as it must be applying the law of Pennsylvania which obviates class suits, the citizenships of the individual members of the unincorporated association must be shown to be wholly diverse from that of the opposing party or those of the opposing parties. Thomas v. Board of Trustees of the Ohio State University, 195 U.S. 207 (1904) and Rosendale v. Phillips, 87 F. 2d 454 (2 Cir. 1937). See also 3 Moore's Federal Practise, 2 ed. Paragraph 17.25, pp. 1412-1413. Compare Fallat v. Gouran, 220 F. 2d 325 (3 Cir. 1955).

From the affidavits filed by the Secretary-Treasurer of the International and from the record as a whole, it is clear that there is no diversity between Underwood and the International at C.A. No. 14,398, nor between the members of Local 542 and the International at C.A. No. 14,547.

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be sufficient to name as defendant either the association by its name, whether the same is registered, filed or not, or any officer of the association as trustee ad litem for such association in the manner prescribed by Rule 2152."

See Pennsylvania Rules of Civil Procedure, Title 12, P.S. Pa.

Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n etc., 105 F. Supp. 537 (W.D. Pa. 1952); Fry Roofing Co. v. Textile Workers Union of America etc., 149 F. Supp. 695 (E.D. Pa. 1957); 3 Moore's Federal Practice, p. 1407 et seq. In any event Rule 8(a), Fed. R. Civ. Proc., 28 U.S.C., requires that a plaintiff suing in a United States district court, must show affirmatively the existence of whatever is essential to jurisdiction, and if he does not do so, the court on discovering the defect must dismiss the case, unless it be cured by amendment. Smith v. McCullough, 270 U.S. 456 (1926). Gibbs v. Buck, 307 U.S. 66 (1939); Miller v. Brown Shipbuilding Co., 165 F. 2d 956 (5 Cir. 1948). Indeed, in the complaints in the cases at bar there are not even averments of the respective citizenships of all the members of the International and of the Local. Compare Tunstall v. Brotherhood of Locomotive F. & E., 148 F. 2d 403 (4 Cir. 1945), in which jurisdiction was based upon a federal question.[4]

We are also of the opinion that the action by Dawson and his associates against Maloney and Wharton as individuals should have been dismissed because of a lack of diversity jurisdiction. Dawson and his associates in the suit at C.A. No. 14,547 seek relief which can be afforded them only by the International. An injunction against Maloney individually or against Wharton individually could not validly preclude the International from enforcing or maintaining its decision against Underwood or the Local. It is clear, therefore, that the International is an indispensable party for the granting of the relief sought by the plaintiffs. Kendig v. Dean, 97 U.S. 423 (1878); Gray v.

[4] In Tunstall v. Brotherhood of Local F. & E., 148 F. 2d 403 (4 Cir., 1945), Rules 17(b) and 23(a), Fed. R. Civ. Proc., 28 U.S.C., were held to offer alternate theories of suit where jurisdiction was based upon a federal question, exception (1) built into Rule 17(b), being applicable. However, where jurisdiction is based on diversity of citizenship the state law must supply the test as to the *locus standi* of the parties.

Reuther, 99 F. Supp. 992 (E.D. Mich. 1951), aff'd 201 F. 2d 54 (6 Cir. 1952). The International must be joined as a party even though that joinder would destroy diversity jurisdiction. Warfield v. Marks, 190 F. 2d 178 (5 Cir. 1951), cert. den. 342 U.S. 887 (1951). Moreover, even if there were diversity—which, as we have demonstrated, there was not—Dawson and his associates failed to aver, as was required, the citizenships of the members of Local 542. For this reason, if for no other, the suit cannot be maintained. It follows therefore that the court below was without power to adjudicate the cause at C.A. No. 14,547 and that that suit must be dismissed by the court below.

As we have stated, the suit at C.A. No. 14,398 in the court below was also brought by Underwood against Maloney as an individual. The plaintiff in this suit seeks two kinds of relief. The first type of relief sought is injunctive which would restore Underwood to the office of President and Business Agent of the Local, and would prevent Maloney and the International from interfering with him in the performance of these duties. Underwood also seeks damages.

As to the requested injunctive relief, all that we have said in the preceding paragraph respecting the suit at C.A. No. 14,547 is equally applicable to this phase of the relief sought at C.A. No. 14,398. As to this phase of the suit and the relief sought by Underwood the International and Maloney as its "Representative" are indispensable parties.

But Underwood in the suit at C.A. No. 14,398 seeks damages also from Maloney as an individual. It is settled law that officers or individual members of an unincorporated association are liable for acts which they individually commit or to which they contributed, Wortex Mills Inc. v. Textile Workers Union of America, 380 Pa. 3, 109 A. 2d 815 (1954); and as to such actions the International is not an indispensable party.

But on the present record at C.A. No. 14,398 there is no

diversity of citizenship for though Maloney as an individual is a citizen of Illinois and Underwood a citizen of Pennsylvania, the citizenship of Maloney in his capacity as a "Representative" of the International, must be deemed to be that of the International and the status of the International for the purpose of diversity jurisdiction is determined by the citizenships of all of its members. The plaintiff, Underwood, a citizen of Pennsylvania, therefore joined as defendants in a single suit, arising out of identical events complained of, Maloney individually, whose citizenship as a resident of Illinois was diverse, and Maloney, as a "Representative" of the International, whose citizenship as a "Representative" of the International was not diverse. It follows that the court below did not possess the power to retain jurisdiction of the suit at C.A. No. 14,398 in view of the parties presently on the record. However, to dismiss the present action and require the plaintiff to start over again in the District Court, as was stated by Mr. Justice Frankfurter in Mullaney v. Anderson, 342 U.S. 415, 417 (1952), "would entail needless waste and runs counter to effective judicial administration . . ." Rule 21 Fed. R. Civ. Proc., 28 U.S.C., can properly come into play at this stage of the litigation. We therefore will treat the case as if the court below had on its own motion dismissed Maloney as a "Representative" of the International as a party defendant.[5]

Treating the suit at C.A. No. 14,398 as a suit by Underwood against Maloney individually, it is clear that Underwood failed to prove his case at the trial. The evidence shows that Underwood was deprived of his office as Presi-

[5] Motions to dismiss were filed in both suits, to the original complaints, based on the ground, *inter alia*, that there was no diversity of citizenship. The complaints were dismissed with leave to amend though lack of diversity was not the ground on which the motions to dismiss were granted. Amended complaints were filed in both suits but no motions to dismiss based on lack of diversity jurisdiction were filed by the parties following the amendments.

dent and General Agent of the Local by the action of the General Executive Board of the International[6] and there is no proof that the General Executive Board was under the domination of Maloney. The court below expressly so held and there is no evidence to the contrary.[7] It appears clearly, therefore, that Underwood must obtain damages, if any, from the members of the General Executive Board or from the International. Underwood has not named the members of the General Executive Board as parties to this suit. The observations already made as to the lack of diversity jurisdiction in respect to the International and the International as an indispensable party need not be repeated here.

The court below entered final judgment in favor of Maloney at C.A. No. 14,398. It had the power to enter such an order since it possessed jurisdiction to adjudicate the issue of damages sought by Underwood from Maloney individually, Ward v. Deavers, 203 F. 2d 72 (D.C. Cir. 1953), but it entered the judgment against Underwood and in favor of Maloney without differentiating as to the relief sought by Underwood against Maloney individually and as a "Representative" of the International. We think it unnecessary to truncate the decree of the court below to effect a distinction now between dismissing the suit for want of jurisdiction as to Maloney in his representative capacity and affirming the judgment in favor of Maloney as an indi-

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[6] It should be pointed out so that there may be no misunderstanding that though Underwood was suspended from his office, as were all the other officers of the Local by the order of President Maloney of August 19, 1952, invoking supervision by the International of the Local, this is not the order upon which the complaint at C.A. No. 14,398 is based. The decision and order upon which that suit is based are those of the General Executive Board signed, September 24, 1952, by Gramling as General Secretary-Treasurer.

[7] The court below stated in this respect: "The Executive Board made its decision uninfluenced by Maloney, although plaintiffs asked me to find directly to the contrary." 152 F. Supp. at p. 666.

vidual. We therefore will simply affirm the judgment at C.A. No. 14,398.

As to the judgment at C.A. No. 14,547, our holding that the court below was without jurisdiction to entertain that suit renders it unnecessary to comment upon or deal with the form or effect of the judgment entered by the court below which purported to grant the relief sought by Underwood but which delayed the effect of the judgment which was entered on May 23, 1957 until September 1, 1957.

It must be borne in mind that the issue of jurisdiction is always open and should be determined *in limine* by a trial court. Mitchell v. Maurer, 293 U.S. 237 (1934); Mansfield C. & L. M. Ry. Co. v. Swan, 111 U.S. 379 (1884). It is desirable that jurisdictional questions be determined promptly to the end that long and costly trials may be avoided or restricted to the pertinent and material issues.

The judgment of the court below as C.A. No. 14,398, on appeal at our No. 12,267 will be affirmed. The judgment of the court below at C.A. No. 14,547, on appeal at our Nos. 12,268 and 12,289, will be vacated and will be remanded with the direction to the court below to dismiss the suit for want of jurisdiction. The appeals at Nos. 12,269 and 12,270 will be dismissed as moot. These were appeals from the action of the court below vacating injunctive relief which need not be detailed here. The injunction entered by this court on June 12, 1957, at our Nos. 12,267 to 12,270 inclusive will be vacated.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12267
(D.C. No. 14398)

ROY J. UNDERWOOD, *Appellant*,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

March 26, 1958

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12268 and No. 12289
(D.C. No. 14547)

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of LOCAL 542 and its branches 542-A, 542-B and 542-C of the INTERNATIONAL UNION OF OPERATING ENGINEERS, (*Appellants in No. 12268*).

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on behalf of the INTERNATIONAL UNION OF OPERATING ENGINEERS, (*Appellants in No. 12289*).

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated and the cause is remanded to the District Court with the direction to dismiss the suit for want of jurisdiction.

Attest:

IDA O. CRESKOFF
Clerk

March 26, 1958

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,267 and 12,269

ROY J. UNDERWOOD, *Appellant*,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers.

Nos. 12,268 and 12,270

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of LOCAL 542 and its branches 542-A, 542-B and 542-C of the INTERNATIONAL UNION OF OPERATING ENGINEERS, *Appellants*,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on behalf of the INTERNATIONAL UNION OF OPERATING ENGINEERS.

Sur Petition for Rehearing

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed May 13, 1958)

By BIGGS, *Chief Judge.*

(1) The plaintiffs-appellants have petitioned for reargument contending that we have construed the provisions of Rule 17(b), Fed. R. Civ. Proc., 28 U.S.C., so as to deny proper force and effect to Rule 23(a) and that we have erred in holding that the court below did not have jurisdiction to decide both suits. We cannot agree.

As pointed out in our first opinion, jurisdiction in these cases is asserted solely on the bases of diversity of citizenship and the substantive rights that were sought to be enforced arose under the common law of the Commonwealth of Pennsylvania. In actions brought in a United States district court where jurisdiction is based on diversity, the capacity of persons to sue or be sued is determined by the law of the state in which the district court sits. Rule 17(b), Fed. R. Civ. Proc., 28 U.S.C. The law of Pennsylvania, while permitting labor unions to sue or be sued as entities, does not allow class suits to be maintained by or against them. See note 3 of our original opinion. Pa. R. C. P. 2230(a);[1] 1 Goodrich-Amram Standard Pennsylvania Practice §2152-2. Accordingly, we held that the unincorporated associations involved in the cases at bar could sue or be sued only as entities in the court below. For purposes of diversity jurisdiction the citizenships of the members of the respective unincorporated associations involved in the cases at bar have to be shown to be diverse. We held that the court below lacked jurisdiction because diversity of citizen-

[1] Note of the Procedure Rules Committee to Rule 2230(a):

"Suits by or against unincorporated associations are not to be brought as class suits under this rule. Such suits are now regulated by Pa. R. C. P. Nos. 2152 and 2153." 1 Goodrich-Amram Standard Practice, §2230.

ship was not made to appear and the lack of diversity was shown affirmatively.[2]

The plaintiffs-appellants contend that Rule 17(b) was intended to broaden the scope of federal jurisdiction by overcoming obstacles relating to capacity.[3] We cannot agree. It is true that when a substantive right conferred by federal law would be impaired otherwise, Rule 17(b)(1) was designed to permit an unincorporated association to be dealt with as an entity or as a class, even though the state court of the forum would refuse to so deal with the unincorporated association. Clark and Moore, "A New Federal Civil Procedure," 44 Yale Law J. 1291, 1315; United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922). But as to cases in which jurisdiction is based upon diversity, as the Court of Appeals for the District of Columbia Circuit stated in Fennell v. Bache, 123 F. 2d 905, 906 (1941): "The purpose of the rule [Rule 17(b)] is to keep or bring the procedure of the federal courts in conformity with that of the courts of the state in which the district court is held, as respects the capacity of partnerships or unincorporated associations for suing and being sued, except when the state court follows the common law and a federal substantive right is involved." It follows, therefore, that where a question of capacity to maintain suit in the district court arises, that capacity must be determined by the law of the state in which the district court is sitting, since the cause of action is of a local rather than of a distinctly federal character.

The plaintiffs-appellants contend, however, that such decisions as Montgomery Ward Co. v. Langer, 168 F. 2d

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[2] Except as to that portion of the suit at C. A. No. 14,398 in the court below in which Underwood sued Maloney individually.

[3] In this connection we point to the provisions of Rule 82, Fed. R. Civ. Proc., 28 U. S. C.: "*Jurisdiction and Venue Unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

182 (8 Cir. 1948) and International Allied P. T. Ass'n v. Master P. Union of New Jersey, 34 F. Supp. 178 (D.C. N.J. 1940) require a different conclusion. There is no question but that in those cases where jurisdiction based on diversity would be defeated by a suit by or against the unincorporated association as an entity that obstacle may be hurdled by the use of a class action, by a suit brought by or against representative members whose respective citizenships are diverse from those of the opposing parties. But in the cases just cited class actions by and against unincorporated associations were not prohibited by the law of the states in which the district courts were sitting. In states where an unincorporated association can neither sue nor be sued as a class, it necessarily follows that the individual members of an association lack the capacity to sue or to be sued as class representatives of the unincorporated association.

In the Commonwealth of Pennsylvania, as we have said, an unincorporated association, or the members thereof, cannot be subjected to a class suit. Suits by or against unincorporated associations in Pennsylvania can be maintained only as provided by Rules 2152 and 2153 of the Pennsylvania Rules of Civil Procedure, 12 P.S. Pa. The employment of the methods prescribed by the Pennsylvania rules cited is not permissive but is mandatory and exclusive.[4] Since under the law of Pennsylvania individuals lack the

[4] While it is true that in most states statutes which permit suits by or against an unincorporated association are permissive, this is not so in Pennsylvania. It should be pointed out that the word "shall" is employed in Rule 2152. And while Rule 2153 states that: "[I]t shall be sufficient to name as defendant either the association by its name . . . or any officer of the association as trustee ad litem for such association" this is still restricted to an action against the association as an entity. What is more, any question as to the permissive nature of these rules is eliminated by the notes of the Procedural Rules Committee to Rule 2230(a) which precludes any suit by or against the association or its members as a class. See note 1, *supra*.

capacity to be sued as class representatives of an unincorporated association, they have no such capacity in the federal courts. 3 Moore, Federal Practice, para. 17.18. It cannot be said that Rule 23(a) which permits class actions generally, does so irrespective of the lack of capacity of the named representatives to sue or be sued under Rule 17(b). It follows that Rule 23(a) cannot aid the plaintiffs-appellants in maintaining jurisdiction in the cases at bar. We adhere to our original ruling.

(2) The plaintiffs-appellants also seek modification of our judgment in respect to the imposition of costs. It would seem fair to divide the costs between the plaintiffs-appellants and the appellees. Orders to that effect will be entered.

(3) When the plaintiffs-appellants filed the petition for rehearing they were unaware that this court did not vacate the injunctive relief heretofore granted by us by the injunction entered on June 12, 1957 at our Nos. 12,267 to 12,270, inclusive. While our opinion stated that the injunction would be vacated it is not our intention to do so until the litigations are terminated either by failure to apply for writs of certiorari, denials of certiorari, or final disposition of the litigations by the Supreme Court of the United States.

Orders will be entered denying the prayers of the petition for rehearing, save only as to costs, as indicated above.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12267

(D.C. No. 14398)

ROY J. UNDERWOOD, *Appellant*,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers.

No. 12268

(D.C. No. 14547)

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of Local 542 and its branches 542-A, 542-B and 542-C of the International Union of Operating Engineers, *Appellants*,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on behalf of the International Union of Operating Engineers.

No. 12269

(D.C. No. 14398)

ROY J. UNDERWOOD, *Appellant*,

v.

WILLIAM E. MALONEY, individually and as representative of the International Union of Operating Engineers.

No. 12270
(D. C. 14547)

HOMER DAWSON, GERALD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of Local 542 and its branches 542-A, 542-B and 542-C of the International Union of Operating Engineers, *Appellants*,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually and as representatives of and on behalf of the International Union of Operating Engineers.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above entitled case is hereby denied.

Attest:

IDA O. CRESKOFF
Clerk

May 13, 1958